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Halim bin Saad v Chan Yok Peng

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(IM)(NCVC)-2277–12 OF 2019
KAMARDIN HASHIM, NANTHA BALAN AND CHE MOHD RUZIMA JJCA
18 SEPTEMBER 2020

C

Civil Procedure — Judgments and orders — Whether judgment/order obtained on merit — Appeal from the decision of High Court — Whether summary judgment order can be set aside — Whether non-response of letter of demand would be fatal to defendant — Whether court in summary judgment order was functus officio — Rules of Court 2012 O 42 r 13

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This was an appeal by the appellant ('defendant') against the decision of the judicial commissioner ('JC') dated 3 December 2019 dismissing the defendant's application (encl 40) to set aside the judgment/order of the High Court dated 12 July 2019 given under O 14 of the Rules of Court 2012 ('the ROC 2012') . The plaintiff and defendant were well known to each other and had had previous business dealings with each other. The plaintiff's claimed against the defendant for recovery of a sum of RM2.5m being the balance of a friendly loan which was given by the plaintiff to the defendant and entered summary judgment on which the JC granted order in terms for the said application under O 42 r 13 of the Rules of Court 2012 on 12 July 2019. The defendant applied to set aside the judgment/order via encl 40 on the basis that the judgment/order was a nullity, that the judgment/order was procured through concealment of facts by the plaintiff, that there were elements of equitable fraud,the plaintiff had no cause of action, the plaintif lacked the requisite locus standi and finally, that the defendant had discovered details of the transactions which were alluded to by the plaintiff in the pleadings and affidavits and which apparently gave a clear picture of the true nature of these transactions. The JC then dismissed the encl 40. Hence, the issues appealed before before this court were: (a) whether summary judgment order can be set aside by means of O 42 r 13 of the ROC 2012; (b) whether the non response of letter of demand would be fatal to defendant; and (c) whether the court in summary judgment order was functus officio. Hence the present appeal.

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Held, dismissing the appeal with cost of RM10,000:

(1) Order 42 r 13 of the ROC was only applicable in respect to the provisions under the ROC which specifically provide for a setting aside or varying

any order or judgment in a situation provided under O 13 r 8 of the ROC (setting aside judgment in default of appearance to a writ) (see para 29).

(2) The judgment/order dated 12 July 2019 was an not a default or consent judgment but rather it was an order/judgment that was obtained on merits after the court had considered all the cause papers (see para 32).

(3) The High Court's interpretation as to the purpose, scope and ambit of O 42 r 13 of the ROC 2012 was correct and the law in this regard had been accurately and lucidly stated. Theourt was of the view that the defendant's application to set aside the judgment/order dated 12 July 2019 pursuant to O42 r 13 of the ROC 2012 was fundamentally flawed. Order 42 r 13 of the ROC 2012 did not apply to an inter partes order which was made pursuant to an application which had been heard on merits. As such, O 42 r 13 of the ROC 2012 was not an avenue for an unsuccessful party to seek a 'review' of the adverse decision (see para 36).

(4) The court concluded that having made the judgment/order on 12 July 2019, the High Court was functus officio and had no jurisdiction to consider encl 40 as it was not predicated on the exceptions which were stated by the Federal Court in *Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393. The matter was in fact barred by res judicata (see para 50).

(5) The defendant had admitted via his defence dated 12 March 2019 and in his affidavit affirmed on 23 May 2019 in opposition to the summary judgment application, that he had indeed borrowed RM3m from the plaintiff and that the loan had been fully paid by way of cash and tranfer of shares in a public listed company. Thus, the defendant's suggestion that the borrower was Cekal Teguh and lender was Tekad Mulia was inherently improbable, was an afterthought and was in stark contrast to the contemporaneous documents and contradicts the defendant's earlier stance per his defence and affidavit. The defendant's failure to respond to the plaintiff's letter and the solicitor's letter of demand seals the fate of the defendant as the non-response was deemed an admission. The appeal was therefore devoid of merits (see paras 51–52).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu ('defendan') terhadap keputusan pesuruhjaya kehakiman ('PK') bertarikh 3 Disember 2019 yang menolak permohonan defendan (lampiran 40) untuk mengenepikan penghakiman/perintah Mahkamah Tinggi bertarikh 12 Julai 2019 yang diberikan di bawah A 14 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012'). Plaintif dan defendan mengenali antara satu sama lain dan mempunyai urusan perniagaan sebelumnya antara satu sama lain. Tuntutan plaintif terhadap defendan adalah untuk mendapatkan semula sejumlah wang sebanyak RM2.5 juta sebagai baki pinjaman mesra yang dimasuki antara plaintif kepada defendan dan memasuki

penghakiman terus di mana PK telah memberikan perintah di bawah A 42 k 13 KKM 2012 pada 12 Julai 2019. Defendan kemudiannya memohon untuk mengenepikan penghakiman/perintah tersebut melalui lamp 40 atas alasan bahawa penghakiman/perintah itu adalah tidak sah, bahawa penghakiman/perintah itu diberikan berdasarkan penyembunyian fakta oleh plaintif, bahawa terdapat unsur-unsur penipuan ekuiti, plaintif tidak mempunyai kausa tindakan, plaintif tidak mempunyai locus standi dan bahawa defendan telah menemui butiran transaksi yang diplidkan oleh plaintif di dalam pliding dan afidavitnya. PK kemudiannya menolak permohonan lampiran 40. Oleh itu, isu-isu yang menjadi alasan rayuan di mahkamah ini adalah: (a) sama ada perintah penghakiman terus boleh diketepikan di bawah A 42 k 13 KKM 2012; (b) sama ada surat tuntutan yang tidak dibalas akan menjadi kes yang fatal kepada defendan; dan (c) sama ada mahkamah dalam ringkasan penghakiman terus adalah functus officio. Oleh itu rayuan ini.

Diputuskan, menolak rayuan dengan kos sebanyak RM10,000:

(1) Aturan 42 k 13 KKM 2012 adalah terpakai untuk mengenepikan atau mengubah apa-apa perintah atau penghakiman di dalam keadaan yang ternyata di bawah A 13 k 8 KKM 2012 (mengenepikan penghakiman ingkar kehadiran untuk writ saman) (lihat perenggan 29).

(2) Penghakiman/perintah bertarikh 12 Julai 2019 bukanlah satu penghakiman ingkar atau penghakiman persetujuan, sebaliknya ia adalah perintah/penghakiman yang diperoleh atas merit selepas mahkamah telah menimbangkan semua kertas kausa (lihat perenggan 32).

(3) Tafsiran Mahkamah Tinggi mengenai tujuan dan skop A 42 k 13 KKM 2012 adalah betul dan tafsiran undang-undang dalam hal ini telah dinyatakan dengan tepat. Mahkamah ini berpendapat permohonan defendan untuk mengenepikan penghakiman/perintah bertarikh 12 Julai 2019 menurut A 42 k 13 KKM 2012 adalah defektif. Perintah di bawah A 42 r 13 ROC 2012 bukanlah satu perintah inter parte seperti permohonan yang telah didengar atas merit. Oleh itu, A 42 k 13 KKM 2012 bukanlah satu jalan yang betul bagi pihak terkilan untuk menilai sesuatu keputusan yang tidak menyebelahinya (lihat perenggan 36).

(4) Mahkamah ini membuat kesimpulan bahawa setelah penghakiman/perintah diberikan pada 12 Julai 2019, Mahkamah Tinggi sudah functus officio dan tidak mempunyai bidang kuasa untuk mempertimbangkan permohonan lampiran 40 seperti yang diputuskan oleh Mahkamah Persekutuan di *Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 39. Permohonan lampiran 40 itu sebenarnya dihalang oleh res judicata (lihat perenggan 50).

(5) Defendan telah mengakui melalui pembelaannya bertarikh 12 Mac 2019

dan dalam afidavitnya bahawa pada 23 Mei 2019 yang mana ianya bertentangan dengan permohonan penghakiman terus, bahawa dia sememangnya meminjam RM3 juta daripada plaintif dan pinjaman itu telah dibayar sepenuhnya melalui wang tunai dan pemindahan saham yang disenaraikan. Oleh itu, kenyataan defendan bahawa peminjam adalah Cekal Teguh dan pemberi pinjaman adalah Tekad Mulia sememangnya tidak mungkin dan merupakan satu pemikiran terkemudian. Kenyataan itu juga bercanggah dengan keterangan dokumen dan pendirian defendan sebelumnya di dalam pembelaan dan afidavitnya. Kegagalan defendan untuk membalas surat plaintif dan surat tuntutan adalah satu kes yang fatal kepada defendan kerana perbuatan itu disifatkan sebagai pengakuan keberhutangan. Oleh itu, rayuan ini tidak mempunyai merit (lihat perenggan 51–52).]

Cases referred to

Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd [1998] 1 MLJ 393; [1998] 2 CLJ 75; [1998] 1 AMR 909, FC (refd)

Mohd Zin bin Omar & Anor v Jentayu Padu Sdn Bhd [2017] MLJU 407; [2017] 1 LNS 403, CA (refd)

Tan Cheng Hock v Chan Thean Soo [1987] 2 MLJ 479; [1986] 1 LNS 42 (refd)

Legislation referred to

Evidence Act 1950 ss 8, 17

Rules of Court 2012 O 13 r 8, O 14, O 14 r 11, O 42 r 13, O 47 rr 1, 11, O 45 r 9, O 70 rr 18(6), 20(9), O 81 rr 1, 7

Appeal from: Suit No WA-22NCVC-40–1 of 2019 (High Court, Kuala Lumpur)

Khalid Yusoff (Mohd Faiz Iskandar with him) (Arief & Iskandar) for the appellant.

Muhammad Syafiq Amani bin Md Sabri (Mahadi Redzuan & Co) for the respondent.

Nantha Balan JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant (defendant) against the decision of the learned judicial commissioner of the High Court dated 3 December 2019 ('the JC') dismissing the defendant's application (encl 40) to set aside the judgment/order of the High Court dated 12 July 2019 given under O 14 of the Rules of Court 2012 ('the ROC') whereby judgment was entered against the defendant. The defendant's application (encl 40) is predicated on O 42 r 13, O 45 r 9 and O 47 r 1 of the ROC. But the specific provision on setting aside

of judgments and orders is O 42 r 13 of the ROC. For brevity and convenience, we shall refer to the parties by their titles in the High Court ie as 'plaintiff' and 'defendant' respectively. On 18 September 2020, we dismissed the defendant's appeal. These are the reasons for our decision.

BACKGROUND

[2] The plaintiff and defendant are well known to each other and have had previous business dealings with each other. The plaintiff's claim against the defendant for recovery of a sum of RM2.5m being the balance of a friendly loan which was given by the plaintiff to the defendant. According to the plaintiff, the defendant was in need of funds and pursuant to the defendant's request, he gave a friendly loan of RM3m.

[3] The loan is said to have been given on 13 November 2014. The defendant had since repaid a sum of RM500,000 via CIMB Bank Bhd Cheque No 586536 dated 6 March 2015 issued by Cekal Teguh Sdn Bhd ('Cekal Teguh'). As such, the balance sum payable under the friendly loan was RM2.5m.

[4] It is relevant to mention at the outset that Cekal Teguh is essentially the defendant's own company. The issued share capital of Cekal Teguh is 100,000 ordinary shares and the defendant is the registered shareholder of 99,997 of the issued share capital of Cekal Teguh. Thus, it is fair to say that the defendant owns and controls Cekal Teguh.

[5] According to the plaintiff, the friendly loan is acknowledged by the defendant in an acknowledgement note dated 13 November 2014.

> RE: FRIENDLY LOAN
>
> This is to confirm that I, received a total cash of Ringgit Three Million Only (RM3,000,000) from Mr Chan Yok Peng (I/C No.520810-02-5429) on 13th November 2014
>
> Name: TAN SRI HALIM SAAD

[6] The balance of the loan ie RM2.5m remained unpaid. The plaintiff sent a letter dated 19 October 2018 and asked the defendant to settle the loan.

[7] The plaintiff's letter to the defendant reads as:

> Our Ref: CYP-001-2018
>
> Date: 19th October 201 [sic]
>
> Yang Bahagia Tan Sri Halim Saad,

43-11 The Boulevard, Mid Valley City, Lingkaran Syed Putra, Kuala Lumpur

Dear Sir,

RE: *OUTSTANDING AMOUNT OF RM2,500,000-00 FOR A FRIENDLY/PERSONAL LOAN FOR THE SUM OF RM3,000,000-00*

I am writing in reference to a friend/personal loan which had been given to yourself in cash amounting to RM3,000,000-00 on 13.11.2014 which you had duly acknowledged.

I enclosed herewith a copy of the said acknowledgement receipt for your reference of the same.

Please take note that you had only repaid the loan via a cheque issued by Cekal Teguh Sdn Bhd on 6.8.2015 for a sum of RM500,000-00 only (see attached). You have still failed and/or refused and/or neglected to pay the balance of RM2,500,000-00.

As such, I hereby demand for the full payment of outstanding amount of RM2,500,000-00 within fourteen days (14) from the date of this letter.

If this matter is not resolved upon the expiry of the fourteen (14) days period, I shall reserve the right to commence legal proceedings to recover all the outstanding amount without further notice to your good self and this letter may be tendered in court as evidence of your failure to pay.

Your prompt response to the above matter is highly appreciated and I am looking forward for your most favourable reply.

Thank you.

Yours sincerely,

(Chan Yok Peng)

CC En Meor Othman Bin Meor Lope

[8] There was no response. The plaintiff then instructed his solicitors, Messrs Mahadi Redzuan & Co to send a letter of demand dated 4 December 2018 which reads as:

Our Ref. :M/LM/1959/18/James-Lit

Date : 4th December 2018

TAN SRI HALIM BIN SAAD

(NRIC NO: 531020-09-5135)

43-11 The Boulevard,

Mid Valley City,

Lingkaran Syed Putra,

Kuala Lumpur.

Dear Sir,

RE: NOTICE OF DEMAND

FOR OUTSTANDING PAYMENT OF RM2,500,00-00

FOR A PERSONAL/FRIENDLY LOAN OF RM3,000,000-00

We refer to the above matter wherein we act for Chan Yok Peng (NRIC NO: 520810-02-5429) of No. 10, Jalan Bidai U8/23, Bukit Jelutong, 40150 Shah Alam, Selangor (hereinafter referred to as '*our Client*'). We are informed by our Client that he had granted a personal/friendly loan to you amounting to RM3,000,000-00 on 13.11.2014 (hereinafter referred to as '*the said personal/friendly loan*') which is payable on demand. Indeed, you had acknowledged the receipt of the said personal/friendly loan (hereinafter referred to as *'the said acknowledgement*') full particulars of which shall be within your own knowledge.

We have been instructed by our Client that you had only paid RM500,00 to our Client vide a CIMB cheque no 586536 dated 6.8.2015 belonging to Cekal Teguh Sdn Bhd a company owns (sic) by you and you have still failed and/or refused and/or neglected to pay to our Client a sum of RM2,500,000-00 being the total sum still unpaid and due despite demands from our Client.

We have also been further instructed by our Client that our Client hereby terminates the aforesaid personal/friendly loan and the agreement either verbal or written arising and/or pertaining to the aforesaid personal/friendly loan with immediate effect.

TAKE NOTICE, that we have been instructed by our Client to demand from you to pay to our Client or to us as the solicitors for our Client the said sum of*RM2,500,000-00 WITHIN FORTEEN (14) DAYS* from the date of this notice hereof together with our legal fees of RM300-00 for the issuance of this notice.

TAKE FURTHER NOTICE, in the event that you failed to pay the aforementioned total outstanding sum/s as hereby demanded within the stipulated period, we are instructed by our Client to proceed with legal action against you for the recovery of all the outstanding sum and all costs incurred therein including costs between solicitors and client basis which shall be borne by you.

Thank you. Yours faithfully,

(MAHADI BIN MUHAMMAD)

c.c. CHAN YOK PENG

[9] Again, there was no response. The plaintiff filed the writ on 23 January 2019. Paragraphs 3, 4, and 5 of the statement of claim read as:

3. Pada setiap masa material, Plaintif adalah kenalan kepada Defendan yang kedua-duanya pernah berurusan dalam hal perniagaan. *Atas permintaan Defendan, Plaintif telah bersetuju untuk memberikan pinjaman persahabatan* (friendly loan) *kepada Defendan wang sebanyak RM3,000,000 ('RM3 juta'). Melalui sebuah pengakuan pinjaman persahabatan, Defendan telah menandatangani dan mengesahkan bahawa Defendan telah menerima wang berjumlah RM3 juta tersebut*

secara tunai daripada Plaintif pada 13.11.2014.

4. Defendan pada setiap masa material mengetahui bahawa Defendan adalah berhutang dengan Plaintif mengikut perjanjian persahabatan tersebut. Pada 6.8.2015, Defendan telah melalui salah satu syarikatnya bernama Cekal Teguh Sdn Bhd (25445-A) membayar sebahagian daripada jumlah pinjaman persahabatan tersebut kepada Plaintif sebanyak RM500,000 melalui cek bernombor CIMB Bank No. 586536 sekaligus meninggalkan baki bayaran tertunggak sebanyak RM2,500,000 ('RM2.5 juta').

5. Pada setiap masa material, Plaintif telah berulang kali menghubungi Defendan menuntut Defendan menjelaskan kesemua baki pinjaman persahabatan tersebut namun, Defendan gagal berbuat demikian. (Emphasis added.)

[10] The defendant filed his defence on 12 March 2019, and it reads as:

1. Defendan menfailkan dan menyerahkan Pembelaan ini tanpa prejudis kepada haknya untuk menfailkan permohonan untuk membatalkan Writ dan Pernyataan Tuntutan ('Tuntutan') Plaintif dan/atau sebarang permohonan interlokutori relevan lain, yang dirizabkan sepenuhnya.

2. Perenggan 1 *sehingga 3 Tuntutan adalah diakui.*

3. *Perenggan 4 Tuntutan diakui setakat Defendan telah melalui Cekal Teguh Sdn Bhd (25445-A) membayar sebahagian daripada jumlah pinjaman persahabatan tersebut kepada Plaintif.*

4. Perenggan 5 Tuntutan adalah dinafikan sekeras-kerasnya. *Defendan seterusnya menegaskan bahawa Defendan telah membuat pembayaran terhadap baki bayaran tersebut secara tunai kepada Plaintif.* Defendan akan mengemukakan keterangan-keterangan mengenai pembayaran tersebut semasa perbicaraan kelak dan/atau bicara permohonan interlokutori, sekiranya ada. Butir-butir pembayaran tersebut juga berada di dalam pengetahuan penuh Plaintif.

5. Perenggan 6 Tuntutan berada di luar pengetahuan Defendan.

6. Perenggan 7 Tuntutan adalah dinafikan. Defendan seterusnya menyatakan bahawa Defendan tidak pernah gagal, cuai, enggan dan/atau abai untuk membayar Plaintif baki jumlah pinjaman tersebut. *Sebaliknya, Defendan telah membuat pembayaran sebanyak RM2.5 juta tersebut secara tunai kepada Plaintif dan butir-butir pembayaran tersebut berada di dalam pengetahuan penuh Plaintif.*

7. Perenggan 8 Tuntutan adalah dinafikan sekeras-kerasnya.

8. Kecuali yang dinyatakan secara nyata, Defendan menafikan setiap dan semua dakwaan-dakwaan di dalam Tuntutan tersebut seolah-olah ia telah dikemukakan dan disangkal secara khususnya. Plaintif diletakkan beban bukti yang kukuh bagi membuktikan Tuntutan beliau.

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9. Berdasarkan perkara-perkara di atas, Defendan memohon supaya Tuntutan Plaintif ditolak oleh Mahkamah yang Mulia ini dengan kos. (Emphasis added.)

B

[11] The plaintiff filed a reply to defence on 21 March 2019:

C

3. Plaintif menafikan perenggan 4 Pembelaan sekeras-kerasnya dan memplidkan bahawa *selain pembayaran sebanyak RM500,000 daripada Cekal Teguh Sdn Bhd (25445-A) melalui cek bernombor CIMB Bank No. 586536 bertarikh 6.8.2015, Plaintif tidak pernah menerima apa- apa bayaran lain terhadap baki pinjaman persahabatan tersebut yang mana masih tertunggak.* Plaintif meletakkan Defendan pada beban bukti yang kukuh. (Emphasis added.)

[12] On 3 May 2019 the plaintiff applied for summary judgment (encl 11). The plaintiffs affidavit in support (affirmed on 3 May 2019) reads as follows:

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5. Pada suatu hari, *Defendan memberitahu saya bahawa beliau memerlukan pertolongan. Atas permintaan beliau, sebagai seorang kenalan, saya telah bersetuju untuk memberikan pinjaman persahabatan (friendly loan) kepada Defendan untuk wang sebanyak RM3,000,000 ('RM 3juta').*

E

6. Sehubungan dengan itu, Defendan telah menandatangani sebuah pengakuan pinjaman persahabatan yang mana Defendan telah mengesahkan bahawa beliau telah menerima wang berjumlah RM 3juta tersebut secara tunai daripada saya pada 13.11.2014.

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7. Pada setiap masa material, saya telah berulang kalimeminta [sic] Defendan membayar balik keseluruhan pinjaman persahabatan tersebut kerana saya memerlukan wang. Berikutan itu, saya kemudiannya telah menerima sekeping cek CIMB Bank Berhad No. 586536 bertarikh 6.8.2015 daripada Cekal Teguh Sdn Bhd (No. Syarikat: 25445-A) untuk jumlah sebanyak RM500,000 sebagai sebahagian bayaran *(part payment)* untuk perjanjian persahabatan tersebut. Untuk makluman Mahkamah yang mulia ini, Cekal Teguh Sdn. Bhd. merupakan salah satu syarikat milik Defendan.

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8. Oleh yang demikian, Defendan sememangnya mengetahui dan mengakui pinjaman persahabatan tersebut dan beliau adalah berhutang dengan saya terhadap pinjaman tersebut sekaligus meninggalkan baki bayaran tertunggak sebanyak RM2,500,000 ('RM2.5juta) [sic].

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9. Selepas daripada itu, saya tidak menerima apa-apa bayaran lain terhadap perjanjian persahabatan tersebut. Saya telah berulang kali meminta Defendan membayarnya, namun Defendan enggan, gagal dan/atau cuai untuk membayar baki pinjaman persahabatan tersebut berjumlah RM2.5 juta.

I

10. Malah, saya juga telah menghantar sepucuk surat tuntutan kepada Defendan bertarikh 19.10.2018 melalui pos berdaftar dan sijil pengakuan pos ke kesemua alamat Defendan yang saya ketahui seperti berikut:-

a) 43-11, The Boulevard, Mid Valley City, Lingkaran Syed Putra, 59200 Kuala Lumpur.

b) 43-2, The Boulevard, Mid Valley City, Lingkaran Syed Putra, 59200 Kuala Lumpur.

c) Level 15-2, Faber Imperial Court, Jalan Sultan Ismail, 50250 Kuala Lumpur.

11. Bukan itu sahaja, saya terus menghubungi Defendan supaya menjelaskan baki bayaran pinjaman persahabatan tersebut. Namun, Defendan tidak mengendahkan tuntutan saya. Oleh yang demikian Defendan telah gagal, cuai, enggan dan/atau abai untuk membayar kepada saya baki jumlah pinjaman persahabatan tersebut sebanyak RM2.5juta yang kini tertunggak, terhutang dan kena dibayar oleh Defendan.

12. Berikutan daripada keingkaran tersebut, saya telah mengarahkan peguamcara cara, Tetuan Mahadi Redzuan & Co menghantar surat tuntutan bertarikh 4.12.2018 kepada Defendan jumlah hutang RM2.5juta yang tertunggak dan sehingga ke hari ini, Defendan masih gagal enggan dan/atau abai untuk membayar baki jumlah hutang sebanyak RM2.5juta tersebut kepada saya.

13. Defendan juga gagal menjawab surat-surat tuntutan tersebut dan Defendan adalah dianggap mengakui tuntutan saya. Seterusnya, adalah dalam pengetahuan saya sendiri bahawa hutang tersebut telah dilakukan dan masih kena dibayar dan terhutang seperti yang telah saya nyatakan.

14. Saya juga ingin menyatakan bahawa Defendan telah memfailkan Pembelaan dan menyatakan bahawa:-

a) Defendan mengakui mempunyai pinjaman persahabatan dengan saya untuk jumlah RM3juta tersebut;

b) Defendan mengakui beliau telah mengesahkan dan menandatangani pengakuan bahawa beliau telah menerima RM3juta tersebut daripada saya secara tunai pada 13.11.2014;

c) Defendan mengakui beliau telah membayar RM500,000 kepada saya melalui syarikatnya Cekal Teguh Sdn Bhd melalui cek bernombor CIMB Bank No. 586536;

d) Namun, Defendan menyatakan telah membayar baki pinjaman persahabatan berjumlah RM2.5juta tersebut secara tunai.

15. Saya sesungguhnya dinasihati peguamcara saya dan percaya bahawa Defendan tiada isu terhadap pinjaman persahabatan tersebut. Ianya jelas daripada pengakuan-pengakuan dalam Pembelaan Defendan tersebut dan satu-satunya isu yang dibangkitkan Defendan adalah beliau telah membayar baki pinjaman persahabatan tersebut sebanyak RM2.5juta kepada saya secara tunai. Walaubagaimanapun, saya telah memfailkan Jawapan kepada Pembelaan dan memplidkan seperti berikut:-

a) selain pembayaran sebanyak RM500,000 daripada Cekal Teguh Sdn Bhd (25445-A) melalui cek bernombor CIMB Bank No. 586536 bertarikh 6.8.2015, saya tidak pernah menerima apa-apa bayaran lain terhadap baki pinjaman persahabatan tersebut yang mana masih tertunggak;

A b) segala penafian dan pembelaan Defendan adalah penafian kosong semata-mata tanpa sebarang bukti.

16. Saya sesungguhnya dinasihati peguamcara saya dan percaya bahawa isu yang dibangkitkan Defendan tersebut adalah fikir semula *(afterthought),* remeh temeh, menyusahkan, membuang masa, dan tidak berasas tanpa sebarang bukti. Sepanjang pengetahuan saya, Defendan tidak pernah membuat apa-apa bayaran tunai terhadap baki pinjaman persahabatan tersebut. Malah, Defendan juga gagal memberikan butiran terperinci mengenai bayaran-bayaran tunai yang tersebut (yang saya nafikan) di dalam Pembelaannya.

C 17. Saya juga dinasihati peguamcara saya dan sesungguhnya percaya bahawa Defendan tiada pembelaan bermerit terhadap tuntutan ini dan tindakan ini adalah jelas dan terang sesuai dibicarakan dibawah Aturan 14 Kaedah-Kaedah Mahkamah 2012. Segala pembelaan yang difailkan hanyalah pembelaan kosong semata-mata untuk menghalang dan melengahkan prosiding sekaligus adalah suatu penyalahgunaan proses Mahkamah yang mulia ini.

D

[13] The defendant filed an affidavit (affirmed on 23 May 2019) to oppose the plaintiff's application for summary judgment.

E **[14]** The defendant's affidavit reads as:

6. *Perenggan 4 sehingga perenggan 8 Afidavit Sokongan tersebut adalah tidak dipertikai.*

7. Perenggan 9 Afidavit Sokongan tersebut adalah dipertikai. Saya menyatakan
F bahawa *saya telah membuat pembayaran terhadap baki pinjaman persahabatan berjumlah RM2.5juta kepada Plaintif.*

8. Saya seterusnya menyatakan bahawa *keseluruhan pembayaran baki pinjaman persahabatan sebanyak RM2.5juta tersebut* telah dibayar secara tunai dan pemberian sahan syarikat tersenarai awam di Bursa Malaysia *oleh saya kepada Plaintif. Saya*
G *merizabkan hak saya untuk mengemukakan bukti pembayaran saya tersebut tersebut [sic] di dalam tindakan ini.*

9. Perenggan 10 Afidavit Sokongan tersebut adalah dipertikai. Saya tidak pernah menerima surat tuntutan tersebut dan tidak ada satu pun surat tuntutan tersebut diakui penerimaannya oleh saya.

H

10. Perenggan 11 sehingga perenggan 13 Afidavit Sokongan tersebut adalah dipertikai. Saya seterusnya mengulangi perenggan 8 di atas.

11. Menjawab kepada perenggan 14 dan perenggan 15 Afidavit Sokongan tersebut, saya menyatakan bahawa baki pinjaman persahabatan tersebut telahpun dibayar
I secara keseluruhan sebanyak RM2.5 juta kepada Plaintif.

12. Perenggan 16 dan perenggan 17 Afidavit Sokongan tersebut adalah dipertikai. Saya atas nasihat peguamcara saya menyatakan bahawa terdapat isu untuk dibicarakan iaitu samada baki pinjaman persahabatan tersebut telah dibayar oleh Defendan kepada Plaintif.

13. Oleh kerana kebanyakan perbicangan *[sic]* di antara Plaintif dan Defendan dilakukan secara lisan, saya menyatakan bahawa isu ini harus dibicarakan di dalam perbicaraan penuh di dalam Mahkamah yang Mulia ini. (Emphasis and underlining added.)

[15] On 12 July 2019 judgment under O 14 of the ROC was entered against the defendant and it reads as:

MAKA ADALAH PADA HARI INI DIPERINTAHKAN bahawa Plaintif dibenarkan untuk memasukkan Penghakiman Terus dan muktamad di bawah Aturan 14 Kaedah 1 Kaedah-Kaedah Mahkamah 2012 terhadap Defendan untuk wang berjumlah sebanyak RM2,500,000 (RINGGIT MALAYSIA DUA JUTA DAN LIMA RATUS RIBU) berserta denda bayaran terlewat pada kadar 5% setahun terhadap RM2,500,000 dari tarikh 19.10.2018 sehingga tarikh penghakiman dan denda bayaran bayaran terlewat pada kadar 5% setahun terhadap RM2,500,000 dari tarikh penghakiman sehingga tarikh penyelesaian penuh DAN AKHIRNYA DIPERINTAHKAN kos sebanyak RM3,500 (RINGGIT MALAYSIA TIGA RIBU LIMA RATUS) sahaja dibayar oleh Defendan kepada Plaintif tertakluk kepada alokatur.

[16] For reasons which are inexplicable and indeed quite unfathomable, the defendant did not appeal to the Court of Appeal against the decision dated 12 July 2019.

[17] However, it is necessary and relevant to mention that a day before judgment was delivered in respect of encl 11 ie on 11 July 2019, the defendant filed an application (encl 25) to amend the defence. The defendant's affidavit in support of his application to amend the defence reads as:

3. Saya membuat afidavit dalam menyokong permohonan Defendan untuk kebenaran untuk meminda Pembelaan bertarikh 12.3.2019 ('Permohonan').

4. Lebih kurang akhir bulan Jun 2019, Defendan, sementara menyediakan hujahan bertulis Defendan terhadap permohonan Plaintif di bawah Aturan 14, Kaedah-Kaedah Mahkamah 2012 telah mendapat tahu maklumat lanjut yang menyokong Pembelaan Defendan terhadap dakwaan Plaintif bahawa Defendan berhutang kepada Plaintif sebanyak RM2,500,000.

5. *Berdasarkan dokumen-dokumen yang saya perolehi, jelas menunjukkan bahawa saya tidak berhutang kepada Plaintif. Saya seterusnya menyatakan* bahawa sekiranya transaksi pinjaman persahabatan yang dinyatakan oleh Plaintif itu sekalipun wujud, ianya adalah diantara syarikat Tekad Mulia Sdn Bhd ('TMSB') dan Cekal Teguh Sdn Bhd ('CTSB').

6. Saya seterusnya menyatakan bahawa bagi menjamin pembayaran CTSB terhadap TMSB tersebut, saya ada memasuki satu perjanjian bertarikh 9.3.2015 bersama Plaintif berkenaan pembelian 40,000,000 unit saham Sumatec Resources Berhad.

A 7. Melalui Perjanjian tersebut, Plaintif berakujanji untuk memberi Harga Belian saham kepada saya dan sebarang pembayaran semula Harga Belian saham yang dinyatakan di dalam Perjanjian tersebut adalah melalui pemberian semula saham dan bukannya pembayaran secara tunai seperti yang dituntut oleh Plaintif di dalam tindakan ini.

B 8. Secara alternatif, saya menyatakan bahawa terdapat banyak transaksi-transaksi di antara TMSB dan CTSB yang mana TMSB ada memegang saham Sumatec Resources Berhad dan berkemungkinan saham yang dijual oleh Plaintif adalah merupakan saham CTSB yang dipegang oleh TMSB sebagai pemegang amanah ('held on trust').

C 9. Ini adalah kerana, merujuk kepada boring pemindahan telegraf bertarikh 17.3.2015 dan 26.3.2015, ia jelas menujukkan [sic] bahawa pemindahan wang sebanyak RM4,000,000 dan RM1,500,000 adalah sebagai penyelesaian pendahuluan atau pinjaman ('settlement of advance/loan'). (Emphasis andunderlining added.)

D

[18] On 12 July 2019 the High Court granted order in terms of encl 11. As such, encl 25 appears to have been abandoned. What is significant about encl 25 and the defendant's affidavit in support thereof is that the defendant E appears to have changed his stance and now asserts that if at all there was a loan, then *it was a loan between Tekad Mulia Sdn Bhd and Cekal Teguh Sdn Bhd.* In essence, via the proposed amended defence he sought to assert that he was not the borrower.

F **[19]** In any event, on 12 September 2019 the defendant applied via encl 40 to set aside the summary judgment/order and this is premised on O 42 r 13 which reads as follows.

Order 42 r 13

G Setting aside or varying judgment and orders

13. Save as otherwise provided in these Rules, where provisions are made in these Rules for the setting aside or varying of any order or judgment, a party intending to set aside or to vary such order or judgment shall make an application to the Court and serve it on the party who has obtained the order or judgment within thirty days H after the receipt of the order or judgment by him.

[20] The defendant's basis for the application (via encl 40) is as stated in the following parts of his affidavit affirmed on 6 September 2019, which read as,

I 6. Atas nasihat peguamcara saya menyatakan bahawa saya mempunyai alasan bermerit untuk mengetepikan Perintah dan Penghakiman tersebut atas sebab-sebab berikut:-

(a) Perintah dan Penghakiman tersebut adalah tidak sah dan terbatal ('nullity');

(b) Perintah dan Penghakiman tersebut diperoleh melalui fakta-fakta yang disembunyikan dan dimanipulasikan ('suppressed and manipulated facts');

(c) Plaintif gagal dan/atau cuai untuk membuat 'full and frank disclosure di dalam permohonan untuk mendapatkan Perintah dan Penghakiman tersebut; dan

(d) Plaintif tidak mempunyai locus standi terhadap saya.

...

8. Di dalam Notis Permohonan (Lampiran 11) tersebut, Yang Arif Puan Rohani Ismail telah membuat dapatan fakta seperti berikut:-

(a) Saya telah membuat pinjaman peribadi sebanyak RM3 juta daripada Plaintif secara tunai pada 13.11.2014 yang mana saya telah mengakui penerimaan jumlah tersebut;

(b) Daripada jumlah RM3 juta tersebut, RM500,000 telah dikembalikan oleh saya kepada Plaintif melalui syarikat Cekal Teguh Sdn Bhd ('CTSB');

(c) Baki RM2.5 juta masih terhutang oleh saya kepada Plaintif.

9. Hakikatnya, setelah meneliti dokumen-dokumen yang baru diperolehi dari Plaintif dan setelah mendapat penjelasan daripada pekerja-pekerja termasuk yang telah berhenti kerja, saya mendapati butiran-butiran seperti berikut:-

(a) Melalui suratcara yang dikeluarkan dan ditandatangani oleh Plaintif yang juga merupakan Pengarah Urusan Tekad Mulia Sdn Bhd ('TMSB') kepada Markmore Sdn Bhd ('MSB') bertarikh 4.3.2016, suratcara tersebut menyatakan secara spesifik di perenggan 2 seperti berikut:-

'Tekad Mulia had also loan to Ybhg Tan Sri RM3,000,000 (hereafter referred to as 'personal loan') on 13th March 2014 (see attached) and was partially paid RM500,000 on 6th August 2015.'

(b) Suratcara bertarikh 4.3.2016 telah mengakui bahawa Defendan adalah bukan peminjam dalam prosiding ini. Perakuan bertulis dari Plaintif dibuat dalam perenggan (c) di bawah ini.

(c) Seterusnya, Plaintif juga di perenggan 3 suratcara tersebut menyatakan bahawa:-

'At the request Ybhg Tan Sri, we *Tekad Mulia*, had loaned RM8,000,000 (hereinafter referred to as 'friendly loan') to Cekal Teguh Sdn Bhd as follow:-

(1) RM4,000,000 (paid on 17th March 2015)

(2) RM1,500,000 (paid on 26th March 2015)

(3) RM2,500,000 (personal loan paid on 13th March 2014)
RM8,000,000

10. Merujuk kepada pernyataan-pernyataan Plaintif di dalam surat tersebut, pinjaman-pinjaman tersebut merujuk kepada pinjaman persahabatan antara

Plaintif dan Defendan yang dinyatakan di dalam tuntutan Plaintif terhadap saya di dalam Notis Permohonan Lampiran 11 beliau.

11. Namun, jelas di dalam surat oleh TMSB tersebut bahawa Plaintif mengakui secara langsung dan bertulis bahawa CTSB sebenarnya peminjam tersebut dan pinjaman tersebut bukan kepada saya, Defendan dalam prosiding ini.

12. Oleh yang demikian, saya atas nasihat peguamcara saya menyatakan bahawa tuntutan yang dibuat oleh Plaintif terhadap saya selaku Defendan adalah satu tindakan salah letak ('misplaced') dan tiada 'locus standi'.

13. ini adalah kerana, sebarang keberhutangan (sekiranya ada) adalah di antara TMSB dan saya mahupun di antara TMSB dan CTSB.

14. Saya seterusnya menyatakan bahawa penerimaan wang berjumlah RM3 juta tersebut diterima bagi pihak CTSB.

15. Sehubungan dengan itu dan/atau dalam alternative, saya atas nasihat peguamcara saya menyatakan bahawa Plaintif telah bertindak dengan tidak bertanggungjawab untuk melakukan penipuan ekuiti ('equitable fraud') terhadap saya dengan melakukan penyembunyian fakta ('suppression of facts') dan memanipulasikan fakta ('manipulation of facts') terhadap gambaran sebenar mengenai keberhutangan CTSB kepada TMSB.

16. Saya seterusnya menyatakan bahawa Plaintif tidak mempunyai sebarang priviti kontrak terhadap saya dan oleh yang demikian, Plaintif tidak mempunyai sebarang kausa tindakan terhadap saya. Ini adalah kerana sebarang priviti kontrak mengenai pinjaman persahabatan tersebut adalah di antara TMSB dan CCTSB.

17. Sehubungan dengan itu, saya atas nasihat peguamcara saya menegaskan bahawa Plaintif tidak mempunyai locus standi untuk membawa tindakan ini ke Mahkamah yang Mulia ini. Peguamcara saya akan mengemukakan hujahan undang-undang pada pendengaran permohonan ini kelak.

18. Melalui surat TMSB tersebut juga, Plaintif menyatakan bahawa terdapat satu Perjanjian Pinjaman Persahabatan bertarikh 9.3.2015 di antara Plaintif dan Defendan yang merujuk kepada pembayaran-pembayaran seperti di perenggan 9(c) di atas.

19. Melalui Perjanjian Pinjaman Persahabatan tersebut, sebarang pembayaran semula pinjaman tersebut oleh saya hanya perlu dibayar dalam bentuk pemberian saham. Klausa 5.1 Perjanjian tersebut jelas menyatakan seperti berikut:-

> 5.1 TSH agrees that he will within seven (7) days of JC's written request made after the Completion Date, return or give back the Sale Shares together with all rights and benefits that attach or accrue to it to JC [...].

20. Berdasarkan Perjanjian tersebut, jelas menunjukkan bahawa saya tidak terikat dengan pembayaran semula Harga Belian tersebut dalam bentuk bayaran tunai seperti yang dipohon oleh Plaintif di dalam tuntutan beliau ke atas saya tersebut.

21. Saya seterusnya menyatakan bahawa segala pengakuan saya terhadap sebarang liabiliti di dalam Pembelaan bertarikh 12.3.2019 dan juga di dalam Afidavit Jawapan saya yang diikrarkan pada 23.5.2019 adalah merupakan satu kesilapan

yang tidak disengajakan. Ini adalah kerana Plaintif dan saya mempunyai banyak transaksi perniagaan sejak perkenalan saya dan Plaintif. Hanya setelah meneliti dokumen-dokumen yang saya baru perolehi dan setelah mendapatkan penjelasan daripada pekerja-pekerja dan bekas pekerja-pekerja barulah saya mendapat butiran jelas dan lengkap mengenai tuntutan Plaintif terhadap saya.

22. Oleh yang demikian, saya percaya bahawa saya ada pembelaan bermerit untuk menyokong permohonan saya untuk mengetepikan Perintah dan Penghakiman bertarikh 12.7.2019 tersebut.

[21] The letter that the defendant relies upon to move the court under encl 40 is a letter by Tekad Mulia Sdn Bhd ('Tekad Mulia') which reads as:

Ref: Dir-Let-16-001 Date: 04 March 2016

Markmore Sdn Bhd

43-11, The Boulevard

Mid Valley City

Lingkaran Syed Putra

59200 Kuala Lumpur

Attention: YBhg Tan Sri Halim Saad

YBhg Tan Sri Halim

RE: SALE OF SUMATEC SHARES

As you are aware, Tekad Mulia Sdn Bhd had on March 18, 2015 sold 40 Million Sumatec Resources Shares (hereafter referred to as the 'sale shares') to Maybank Nominees (Tempatan) Sdn Bhd for Markmore Sdn Bhd @RM0.0205/share. The total amount for the sale is RM8,186,500 (see attached).

Tekad Mulia had also loaned to YBhg Tan Sri RM3,000,000 (hereafter referred to as 'personal loan') on 13th March 2014 (see attached) and was partially paid RM500,00 on 6th August 2015.

At the request of YBhg Tan Sri, we, Tekad Mulia, had loaned RM8,000,000 (hereafter referred to as 'friendly loan') to Cekal Teguh Sdn Bhd as follows:

(1) RM4,000,000 (paid on 17th March 2015)

(2) RM1,500,000 (paid on 26th March 2015)

(3) *RM2,500,000* (personal loan paid on 13th March 2014)
RM8,000,000

As per the Friendly Loan Agreement dated 9th March 2015, YBhg Tan Sri has to pay 15% profit margin based on the friendly loan amount 15% x RM8,000,000 = RM1,200,000

We hereby submit a written request to Markmore Sdn Bhd to return the sale shares together with the profit margin to Tekad Mulia within 7 days from the date of this

letter as per Clause 5.1 (undertaking by TSH) of the Agreement signed on 9th March 2015.

RM1,200,000

Less *RM 186,500* (Difference between the sale share price and loan amount) *RM1,013,500*

Your prompt attention to the above matter will be greatly appreciated and we look forward to an amicable settlement.

Thank you.

Yours sincerely,

JAMES CHAN

Managing Director Tekad Mulia Sdn Bhd

cc: Encik Meor Othman, Cekal Teguh Sdn Bhd

[22] In opposing encl 40, the plaintiff affirmed an affidavit on 14 October 2019 the relevant parts of which read as:

7. I strictly deny and dispute the paragraph 6 of the Affidavit in Support and its sub-paragraph thereof. I have been advised by my solicitors and verily believe that this Defendant's application under Order 42 Rule 13, Order 45 Rule 9 and Oder 47 Rule 1 is defective and against the rules and procedures of the Court. This application is tantamount to a clear abuse of process of the Court. My Solicitors will submit further during hearing of this application.

...

9. I do not dispute paragraph 7 of the Affidavit in Support. I was advised by my solicitor and verily believed that there was no issue of nullity, suppression and manipulation of facts, and full and frank disclosure, as the Defendant had exercised his right to be heard in the proceeding and had exhausted all avenues thereof through the filing of cause papers. Therefore, the Defendant's application is caught by *res judicata* and estopped from raising any new and/or fresh issues after the fall of the hammer.

10. I refer to paragraph 8 of the Affidavit in Support and have no knowledge of the content thereof. I request the Defendant to provide full particulars thereof. As at to date, my solicitors and I have not received any ground of judgment in respect of Encl 11.

11. I deny paragraphs 8 - 22 of the Defendant's Affidavit in Support and reiterate my depositions as in paragraphs 7 - 9 above as my reply hereof. My solicitors will submit on the issue of law during the hearing of this application. I wish to state further that pursuant to the letter dated 4.3.2016 at Exhibit HS-3 page 64 of the Defendant's Affidavit in Support, it is crystal clear that the sum of RM3,000,000 which had been paid RM500,000 and leaving balance of RM2,500,000 is a 'personal loan' which I had loaned to the Defendant personally. The Defendant had admitted that it is a personal loan to him by his conduct to make part payment of

RM500,000 directly to me (page 39 Defendant's Affidavit in Support) in accordance to the Acknowledgement of Personal loan duly executed by him (page 37 Defendant's Affidavit in Support)

12. Nevertheless, I wish to state that the Defendant had an ample time to prepare for his case since my letter of demand dated 19.10.2018 (page 48 Defendant's Affidavit in Support) until the date of filing the Defendant's Affidavit in Reply for Encl 11 on 23.5.2019 (page 53-55 Defendant's Affidavit in Support.

13. I am further advised by my solicitor and verily believed that should the Defendant is not satisfied by the decision before this Honourable Court, an appeal to the Court of Appeal is the quorum for the Defendant. This Defendant's application to this Honourable Court to set aside its own decision arrived upon merit, if allowed, would create a mockery in the judicial system whereby this Honourable Court has became functus officio upon deciding Encl 11. My solicitors will submit further on this issue during hearing of this application.

[23] The defendant then filed an affidavit (affirmed on 17 October 2019) in response where he said:

4. Menjawab kepada perenggan 11, saya menyatakan bahawa di dalam surat bertarikh 4.3.2016 tersebut jelas menyatakan bahawa peminjam yang sebenar adalah Tekad Mulia Sdn Bhd dan bukannya Plaintif.

Oleh yang demikian, pinjaman peribadi seperti yang didakwa oleh Plaintif adalah di antara Tekad Mulia Sdn Bhd dan Cekal Teguh Sdn Bhd dan bukannya di antara Plaintif dan saya.

5. Saya seterusnya menyatakan bahawa bayaran RM500,000 tersebut dibuat oleh Cekal Teguh Sdn Bhd dan bukannya saya. Ia jelas menunjukkan bahawa Cekal Teguh Sdn Bhd merupakan peminjam sebenar dan bukannya saya.

6. Di dalam Surat Pengakuan Pinjaman Peribadi yang didakwa oleh Plaintif (yang mana dinafikan saya), saya menyatakan bahawa surat pengakuan tersebut hanyalah pengakuan bahawa saya ada menerima wang tersebut. Namun, penerimaan wang tersebut adalah bagi pihak Cekal Teguh Sdn Bhd dan bukannya atas kapasiti peribadi.

7. Oleh yang demikian, pihak yang sepatutnya membayar balik pinjaman tersebut, sekiranya ada, adalah Cekal Teguh Sdn Bhd dan bukannya saya, Plantif di dalam tindakan ini juga gagal dan/atau cuai untuk mengambil tindakan terhadap Cekal Teguh Sdn Bhd berkenaan pinjaman peribadi tersebut.

8. Oleh yang demikian, atas nasihat peguamcara saya, saya percaya bahawa tiada priviti kontrak di antara Plaintif dan saya dan seterusnya Plaintif tidak mempunyai sebarang *locus standi* dan kausa tindakan terhadap saya. Peguamcara saya akan mengemukakan hujahan undang-undang di dalam hujahan permohonan ini kelak.

9. Saya seterusnya menyatakan bahawa Plaintif telah gagal dalam memberikan gambaran sebenar mengenai penghutang dan pemiutang yang sebenar dan seterusnya Plaintif telah bertindak dengan tidak bertanggungjawab untuk melakukan penipuan ekuiti (*'equitable fraud')* terhadap saya dengan melakukan

penyembunyian fakta (' *suppression of facts')* dan memanipulasikan fakta *('manipulation of facts')* dan tindakan ini.

10. Berikutan isu penipuan ekuiti dan seterusnya isu ketiadaan priviti kontrak di antara Plaintif dan saya yang menjurus kepada ketiadaan locus standi dan kausa tindakan terhadap saya, saya atas nasihat peguamcara saya percaya bahawa Perintah dan Penghakiman yang dikeluarkan oleh Mahkamah yang Mulia ini adalah tidak sah dan terbatal ('*nullity*') dan boleh diketepikan *ex debito justitate.*

11. Bagi menjawab perenggan 12 Afidavit Jawapan Plaintif, saya menyatakan bahawa surat bertarikh 4.3.2016 tersebut baru diperolehi dan setelah mendapatkan penjelasan daripada pekerja-pekerja dan bekas pekerja-pekerja saya, barulah saya mendapat butiran lengkap mengenai tuntutan Plaintif terhadap saya.

12. Menjawab kepada perenggan 13 Afidavit Jawapan Plaintif, saya atas nasihat peguamcara saya percaya bahawa Mahkamah yang Mulia ini mempunyai bidangkuasa untuk mengetepikan Perintah dan Penghakiman yang bersifat tidak sah dan terbatal ('*nullity*') kerana terdapat unsur penipuan ekuiti dan seterusnya prinsip '*functus officio*" dan '*res judicata*' seperti yang dibangkitkan oleh Plaintif adalah tidak terpakai di dalam keadaan ini. Peguamcara saya akan mengemukakan hujahan undang-undang di dalam hujahan permohonan ini kelak.

[24] Essentially, via encl 40, the defendant was attempting to move the High Court under O 42 r 13 of the ROC to set aside the judgment/order dated 12 July 2019 on the basis that the judgment/order was a nullity, that the judgment/order was procured through concealment of facts by the plaintiff, that there were elements of equitable fraud,the plaintiff has no cause of action, the plaintif lacks the requisite locus standi and finally, that the defendant has discovered details of the transactions which were alluded to by the plaintiff in the peladings and affidavits and which apparently gave a clear picture of the true nature of these transactions.

[25] On 3 December 2019, the JC dismissed the defendant's application.

[26] The present appeal is directed at the JC's said decision.

OUR FINDINGS

[27] We shall start the JC's grounds ofjudgment.

[28] In her grounds of judgment, the JC said (at para 9), that the defendant's reliance on O 42 r 13 of the ROC is flawed.

[29] According to the JC, O 42 r 13 of the ROC is only applicable in respect to the provisions under the ROC which specifically provide for a setting aside or varying any order or judgment in a situation provided under O 13 r 8 of the ROC (setting aside judgment in default of appearance to a writ), O 14 r 11 of

the ROC *(setting aside judgment against a defendant who does not appear at the hearing of a summary judgment application),* O 70 rr 18(6), 20(9) *(setting aside judgment for failure to lodge a preliminary act in an admiralty proceeding),* O 81 r 7 of the ROC *(setting aside judgment against a defendant who does not appear at the hearing of an application under* O 81 r 1 of the ROC).

[30] The JC also ruled *(paras 10–11 of the judgment)* that O 45 r 9 and O 47 r 1 of the ROC are not relevant in so far as encl 40 seeks to set aside the judgment/order dated 12 July 2019.

[31] The JC also opined (para 12 of the judgment) that the defendant should have lodged an appeal against the judgment/order dated 12 July 2019. She concluded that encl 40 was an 'abuse of process'.

[32] Next, the JC was of the view (para 15 of the judgment) that the judgment/order dated 12 July 2019 was an not a default or consent judgment but rather it was an order/judgment that was obtained on merits after the court had considered all the cause papers. Thus, the High Court was functus officio and had no jurisidction to set aside the judgment/order, except under the narrow exceptions posited by the Federal Court in the seminal case of *Badiaddin Mohd Mahidin & Anor v Arab Malaysian Finance Bhd* [1998] 1 MLJ 393; [1998] 2 CLJ 75; [1998] 1 AMR 909 (FC).

[33] On the issue of suppression of evidence and manipulation of facts and equitable fraud, the JC opined that both parties were represented by counsel and they had every opportunity of plaing all the rlevant materials before the court. As such, the JC held that the jurisdiction to set aside a judgment/order on the grounds that it is a nullity only arises where it is made in conflict of written law or in excess ofjurisdiction.

[34] The JC noted (paras 16–17 of the judgment) that in encl 40 the defendant did not assert that that the judgment/order is in breach of written law such as to render it a nullity. The JC found (para 19 of the judgment) that in light of the defendant's earlier stance per his defence and affidavit in opposition to the plaintiff's summary judgment application, ie that he borrowed RM3m from the plaintiff and had paid the loan back in full, the subsequent allegations raised in support of encl 40 are an 'afterthought' and the defendant has not come to court with 'clean hands'.

[35] The JC also concluded that since the judgment/order was heard on merits, the matter is barred by res judicata.

[36] At the outset, we are compelled to state that the JC's interpretation as to the purpose, scope and ambit of O 42 r 13 of the ROC is correct and the law

in this regard has been accurately and lucidly stated. We are likewise of the view that the defendant's application to set aside the judgment/order dated 12 July 2019 pursuant to O 42 r 13 of the ROC is fundamentally flawed. We do not think that O 42 r 13 of the ROC applies to an inter partes order which is made pursuant to an application which had been heard on merits. O 42 r 13 of the ROC is not an avenue for an unsuccessful party to seek a 'review' of the adverse decision.

[37] Indeed, the proper route would have been for the defendant to appeal to the Court of Appeal against the summary judgment order dated 12 July 2019. And if the so-called fresh information or documents were discovered or unearthed belatedly, and if they are credible, critical, relevant and persuasive to the issue at hand, then the defendant could have applied to the Court of Appeal and adduced them as 'fresh evidence' in the very appeal itself.

[38] It is important to note that on 11 July 2019 ie a day before the JC's decision was delivered, the defendant filed an application (encl 25) to amend the defence to raise the very matters which were eventually relied upon in encl 40 which was only filed on 12 September 2019.

[39] It is obvious enough that by 11 July 2019 the defendant was already seized of the so-called information pertaining to the alleged loan between Tekad Mulia and Cekal Teguh. But as it turned out, the defendant waited almost two months before filing encl 40. The delay is baffling.

[40] But what is more perplexing is the defendant's averment in his affidavit in support of encl 40 that the loan was between Tekad Mulia and Cekal Teguh. It is clear that in his defence dated 12 March 2019 and in his affidavit in opposition to the summary judgment application, the defendant's unequivocal position was that he indeed borrowed from the plaintiff but had repaid the loan in full.

[41] In fact, he claimed that he had settled the loan by way of payment in cash and by way of transfer of shares in a public listed company. Later, for purposes of encl 40, the defendant sought to say that he never borrowed at all. He said that it was Cekal Teguh which borrowed RM3m from Tekad Mulia.

[42] There is no explanation by the defendant as to why he had previously admitted in his defence and in his affidavit to oppose the summary judgment application, that he had borrowed RM3m from the plaintiff and that he had fully repaid the loan in cash and by way of shares.

[43] At any rate, as counsel for the plaintiff had quite rightly submitted, there was evidence of a friendly loan of RM3m to the plaintiff. In this regard it

has to be borne in mind that the defendant is not a simple-minded person or someone who is unfamiliar with commercial matters.

[44] By all accounts, the defendant is a businessman and would have been, or at any rate, ought to have been aware of the implications of affixing his signature to a document such as for example, the acknowledgment note dated 13 November 2014 and the adverse inferences that will be drawn when commercial/legal letters are not responded to.

[45] Here, there is no dispute that the defendant had indeed signed the acknowledgement note on 13 November 2014 and that document captioned as 'Friendly Loan' states unambiguously that the defendant 'received a total cash of Ringgit Three Million Only (RM3,000,000) from Mr Chan Yok Peng (I/C No. 520810-02-5429) on 13th November 2014'. The defendant states that the acknowledgemnt merely indicates that he received the loan monies, but the real borrower was in fact Cekal Teguh. However, the fact that Cekal Teguh is the borrower is not mentioned in the acknowledgement note. In fact, a plain reading of the acknowledgment note indicates that it is the defendant who borrowed RM3m from the plaintiff.

[46] Next, we note that the defendant did not respond to the plaintiff's letter dated 19 October 2018 and to the solicitor's letter of demand dated 4 December 2018. The non-response to the latter documents is fatal to the defendant. Being a person of business, the defendant could not have been unaware of the grave implications to himself by not responding to and repudiating the contents of both the letters.

[47] In this regard, it becomes relevant and necessary to refer to the Court of Appeal's decision in *Mohd Zin bin Omar & Anor v Jentayu Padu Sdn Bhd* [2017] MLJU 407; [2017] 1 LNS 403, CA, where Prasad Sandosham Abraham JCA (as he then was) said,

> [10] We had during the course of submissions by the Plaintiff, had our attention drawn to *the Letter of Demand sent by the Plaintiff in this case (see Common Core Bundle pg. 208). There was no response from the Defendants.* In our view that would have presented the Defendants the best opportunity to present the version of the Defendants but it was not done.
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> We refer to the Court of Appeal decision of *Small Medium Enterprise Development Bank Malaysia (formerly known as Bank Perusahaan Kecil dan Sederhana Malaysia Bhd) v Lim Woon Katt* [2016] 5 MLJ 220; [2016] 9 CLJ 73 where His Lordship Hamid Sultan JCA held:
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> (a) in the instant case, *it was not in dispute that the respondent did not respond to the demand notice* of the plaintiff and the defence alleging that he was not liable was only raised in the statement of defence. *Evidently, failing to respond to the plaintiff's letter of demand, that too when the defence case was*

related to forgery, as well as the fact that the respondent did not lodge a police report upon receiving the demand, weakened the probative force of the defence case. In *Wong Hon Leong David v Noorazman bin Adnan* [1995] 3 MLJ 283; [1995] 4 CLJ 155, the Court of Appeal went to the extreme end to say that failure to respond on the facts of the case should lead to entering of judgment. Justice Gopal Sri Ram JCA at p 159 had this to say:

On December 17, 1991, the respondent wrote to the appellant confirming an agreement between them whereby the former was to receive an additional fee of RM100,000 if he assisted in resolving the problem regarding the access. It is the respondent's case that he did in fact obtain the required access through his exertions. The appellant, however, denies any agreement to pay the additional fee. In respect of this sum, the learned Judge granted leave to defend. We would digress for a moment to say a few words about this latter order of the learned judge.

During argument, we registered our surprise at the learned Judge's reluctance to enter judgment for this sum of RM100,000. After all, the appellant had failed to respond to the letter of 17 December. If there had never been an agreement as alleged, it is reasonable to expect a prompt and vigorous denial. But, as we have pointed out, there was no response whatsoever from the appellant.

(b) in abundance of caution we must say that failure to respond must not be equated to admission of the claim under s 17 of the Evidence Act 1950 (EA 1950). Failure to respond will relate to conduct under s 8 of the EA 1950. Conduct is a relevant fact for the court to take into account to give the relevant probative force to the version of the plaintiff and/or defendant's case. It is well settled that not all demand notices must be responded. In *Wiedmann v Walpole* [1891] 2 QB 534, in an action for breach of promise of marriage, it was held, that the mere fact that the defendant did not answer letters written to him by the plaintiff in which she stated that he had promised to marry her, was no evidence corroborating the plaintiff's testimony in support of such promise;

(c) it must also be noted that *in commercial cases (not civil), Courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree.* (See *PECD Construction Sdn Bhd v Freehold Point Sdn Bhd* [2008] MLJU 127; [2008] 3 CLJ 215);

(d) there is a latin maxim which says 'silence amount to consent'. (See *Quit tracet consentire videtur).* However, this is not part of our law of evidence. Failure to respond goes to conduct and is a relevant fact and not an admission as stated in illustration (g) of s 8 of the EA 1950, which reads as follows;

(e) the question is whether A owes B RM10,000:
The facts that A asked C to lend him money, and that D said to C in A's presence and hearing: 'I advise you not to trust A for he owes B RM10,000,' and that A went away without making any answer are relevant facts; and

(f) in the instant case, the learned trial judge failed to take into account that the appellant's demand notice in a commercial matter was not responded to. Further there was no reason or justification for not responding to it. The omission of the learned trial judge to do so in our view compromised the decision making process.

[48] We also have in mind the judgment of Edgar Joseph Jr J in *Tan Cheng Hock v Chan Thean Soo* [1987] 2 MLJ 479; [1986] 1 LNS 42 at p 487 where he said:

> In *Wiedemann v Walpole* [1891] 2 QB 534 at p 537 an action for breach of promise of marriage, it was held, that the mere fact that the defendant did not answer letters written to him by the plaintiff in which she stated that he had promised to marry her, was no evidence corroborating the plaintiffs testimony in support of such promise.
>
> Lord Esher MR, in his judgment, remarked, 'Here, we have only to see whether the mere fact of not answering the letters, with nothing else for us to consider is any evidence in corroboration of the promise'. (Emphasis supplied.) Earlier, in his judgment, he said, *'Now there are cases — business and mercantile cases in which the courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives that letter must answer it if he means to dispute the fact that he did so agree'.* (Emphasis added.)

[49] Having considered the matter in the round, we are impelled to the view that the JC has not erred in any way in her approach to the issues at hand and in her ultimate decision to dismiss encl 40. In the present case, the JC had applied her mind to all the relevant facts and circumstances of the case. The JC also properly directed herself upon the principles of law that were applicable to the case before her. After weighing all relevant considerations, the JC arrived at her conclusions as per the grounds of judgment. In conclusion, we are of the view that the appellant has failed to demonstrate that the JC made any error of principle when making her decision to dismiss encl 40.

[50] In summary, it is our conclusion that having made the judgment/order on 12 July 2019, the High Court was functus officio and had no jurisdiction to consider encl 40 as it was not predicated on the exceptions which were stated by the Federal Court in *Badiaddin's* case. The matter is in fact barred by res judicata.

[51] Further, it is clear that the defendant had admitted via his defence dated 12 March 2019 and in his affidavit affirmed on 23May 2019 in opposition to the summary judgment application, that he had indeed borrowed RM3m from the plaintiff and that the loan had been fully paid by way of cash and tranfer of shares in a public listed company. Thus, the defendnat's suggestion that the

borrower was Cekal Teguh and lender was Tekad Mulia is inherently improbable, is an afterthought and is in stark contrast to the contemporaneous documents and contradicts the defendant's earlier stance per his defence and affidavit. Lastly, the defendant's failure to respond to the plaintiff's letter and the solicitor's letter of demand seals the fate of the defendant as the non-response is deemed an admission. See: *Mohd Zin Omar*'s case and *Tan Cheng Hock*'s case.

[52] We accordingly find the appeal to be devoid of merits and it is therefore dismissed with costs of RM10,000 (subject to allocator).

Appeal dismissed with costs of RM10,000.

Reported by Muhamad Azham Marwan